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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re V. D., et al., Persons Coming Under the
Juvenile Court Law.

B205227

(Los Angeles County
Super. Ct. No. CK69390)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

P. D.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Sherri Sobel,
Referee. Reversed in part and affirmed in part.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant
and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

Father P. D. appeals from the order adjudicating his three children dependents. He claims there was insufficient evidence to support the court's jurisdictional findings. For this reason, he claims the dispositional order removing the children from his custody is moot. We conclude there is insufficient evidence to support dependency jurisdiction based on Welfare and Institutions Code section 300, subdivision (b),¹ but the evidence is sufficient to support jurisdiction under section 300, subdivision (d). We affirm the jurisdictional and dispositional orders.

FACTUAL AND PROCEDURAL SUMMARY

In 2007, when this dependency proceeding was instituted, mother and father had been separated for five years. In July of that year, after returning from a two-week visit with his father, 11-year-old V. D. told his mother that his father had fondled him while masturbating, and had forced him to look at pornographic pictures on the internet. Mother then questioned V. D.'s younger sisters, nine-year-old S. D. and eight-year-old M. D., each of whom reported some inappropriate touching by father. Mother took the children to the Lennox Sheriff's station, where they were interviewed. In the next days, the children and mother were interviewed by a social worker from the Department of Children and Family Services (DCFS) and by a detective from the Los Angeles Sheriff's Department Special Victim's Bureau.

DCFS filed a section 300 petition on behalf of the children, alleging sexual abuse by father, exposure to domestic violence between mother and father, and father's use of marijuana and alcohol. The children were detained in mother's home, and father was permitted only monitored visitation.

At a contested jurisdictional hearing, the children testified in chambers, as did the son of mother's partner, who also lives in mother's home. The court also heard

¹ All statutory references are to the Welfare and Institutions Code unless otherwise specified.

testimony from father, mother, mother's partner, various social workers, the children's therapist, and others.

The court sustained two counts of the petition, as amended: that father "demonstrated inappropriate boundaries" with the children (count b-2), and that father sexually abused V. D. by fondling his penis while masturbating, and forcing him to watch pornographic pictures (count d-1). The remaining counts were dismissed. The children were declared dependents, and placed in mother's home. DCFS was ordered to provide family maintenance services to mother and reunification services to father. Father was ordered to participate in individual counseling, conjoint counseling at the discretion of the children's therapist, and a sexual abuse perpetrator program. He was given weekly monitored visitation, and DCFS was given discretion to increase the time and duration of the visits. Father filed this timely appeal from the adjudication and disposition orders.

DISCUSSION

Father argues there is insufficient evidence to support the court's jurisdictional findings under section 300, subdivisions (b) and (d). "When an appellate court reviews a sufficiency of the evidence challenge, we may look only at whether there is any evidence, contradicted or uncontradicted, which would support the trier of fact's conclusion. We must resolve all conflicts in favor of the court's determination, and indulge all legitimate inferences to uphold the court's order. Additionally, we may not substitute our deductions for those of the trier of fact." (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) Viewing the evidence in accordance with this standard, we find substantial evidence supports the court's finding under section 300, subdivision (d), but not its finding under subdivision (b).

A jurisdictional finding may be made under section 300, subdivision (d) when "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to

adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.”

Penal Code section 11165.1, subdivision (b)(4), defines sexual abuse to include sexual assault, and defines sexual assault to include “[t]he intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.” Sexual assault also includes “[t]he intentional masturbation of the perpetrator’s genitals in the presence of a child.” (Pen. Code, § 11165.1, subd. (b)(5).)

The allegation in support of count d-1 was that: “On numerous prior occasions, the child [V. D.] was sexually abused by his father, [P. D.], including the father fondling the child’s penis and while the father masturbated the father’s penis. The father forced the child to watch pornographic pictures. The sexual abuse of the child, [V. D.], by the father endangers the child’s physical and emotional health and safety and places the child and the child’s siblings [S. D.] and [M. D.] at risk of physical harm, damage, danger and sexual abuse.”

V. D. testified in chambers that on more than one occasion when he visited his father, his father would call him into the room and show him “nasty pictures” on his laptop computer. There were pictures of naked women, and of naked men and women together touching each other. He testified about one occasion in April when he and his father were sitting on his father’s bed looking at these types of pictures. His father reached into V. D.’s boxers and touched V. D.’s penis, moving his hand up and down. At the same time, his father touched his own private parts inside his pants with his other hand. V. D. testified that this also happened on another occasion a few weeks later, at the beginning of the summer. His sisters were asleep in the house when this occurred.

V. D. testified that in April he had downloaded pictures of naked girls onto his cell phone. His mother discovered those pictures and tried to erase them. They had a talk

about the pictures, but V. D. did not tell her at that time about the pictures of naked men and women that his father showed him on the computer. V. D. testified that he did not tell anyone about the April touching incident “[b]ecause I didn’t really think it was bad.” But when V. D. and his sisters returned to their mother’s house after the second incident, V. D. told his mother what had happened. It was this revelation that gave rise to the dependency petition.

V. D. mentioned only the second incident and the computer images to his mother and to the investigating officer, but his statements were otherwise very consistent with his testimony at the hearing. The court acknowledged that V. D. was reluctant to testify about these incidents. The court questioned V. D. about his truthfulness, asking if he was making up the story so he would not be in trouble for having dirty pictures on his phone. V. D. assured the court that was not the case. At the conclusion of the hearing, the court stated, “Do I believe that [V. D.’s] father touched his penis in a way that made [V. D.] feel that he had been violated? Yes, I do.” The court recognized it was possible that V. D. could have told the story to avoid being in trouble, but noted there were many less embarrassing ways he could have done that. “I don’t think he lied, and I believe what—that what the father did was far beyond inappropriate.”

Father’s conduct of moving his hand up and down on V. D.’s penis while touching his own penis and looking at pictures of naked men and women on the computer supports the inference that the touching was done “for purposes of sexual arousal or gratification,” within the meaning of Penal Code section 11165.1, subdivision (4). And father’s masturbation in front of V. D. constitutes sexual assault under subdivision (5) of that section. Indulging all inferences in favor of the court’s credibility determination, we find sufficient evidence in V. D.’s testimony to support the finding that V. D. was sexually abused by father, and therefore was a person described by section 300, subdivision (d).

The evidence with regard to the younger girls was more ambiguous. According to V. D., the girls were present on some occasions when they looked at the naked pictures on father’s computer. S. D., who was 10 years old at the time of the hearing, testified that she saw her father looking at pictures of girls wearing bikinis on the computer. She

also testified that when she was nine years old, her father touched her in the wrong way on her chest when he was drying her off after a shower. She did not tell anyone because she was “really nervous.” S. D. did not want her father to dry her off anymore: “I keep on telling him that I’m old enough but he says no.” She stated her father touches her private parts with the towel when he dries her off, and one time she felt him touch her with his hand when he was drying her off. S. D. also testified that during the two-week summer visit in 2007, she dried herself off after showers.

S. D. testified that she was in court because her father molested her. The court asked her about her use of that word. She explained she had heard the word at school, and that she knew it had happened to her. The court clarified that S. D. meant she had been taught about good touching and bad touching. She admitted the only bad touching was when father dried her off after her showers. She had told him she did not want him to do that “[b]ecause I didn’t feel good.” Asked why, she said, “Because it made me feel icky inside.”

Eight-year-old M. D. testified that she saw ladies wearing bathing suit bottoms and tops on her father’s computer. She testified that on occasion she would wet her bed and go into her father’s bed to sleep. One time, when she was falling asleep, her father leaned up against her and she felt his “private part.” She said that her father touched her between her legs with his hand when she was in his bed. They were lying face to face at the time.

Father admitted that occasionally he would go into the bathroom when one of the girls was showering and actually use the toilet. He denied the other conduct testified to by the children.

The court also heard testimony from Dr. Janine Shelby, a licensed psychologist with specialties in child psychology and trauma psychology. Dr. Shelby had been treating the children for several weeks, and found them to be “exceedingly anxious.” They each expressed serious anxiety about visiting with father, and she saw no characteristics which indicated they had been coached.

The court considered this and other evidence when it explained: “My concern, when it comes right down to it regarding the girls, is definitely father’s judgment. And

notwithstanding father's counsel, you occasionally roll over and your penis occasionally touches or maybe once touches your eight-year-old child? No. No. Your penis does not touch your eight-year-old child anywhere. Ever. When it comes to the children's testimony, especially the girls, it appears to me that the behavior that the father exhibited is far more in the realm of inappropriate boundaries, wildly inappropriate boundaries, but inappropriate boundaries nonetheless. Toweling the children off, having to bring the towels to the children [during their showers], being in a home where all three bedrooms are linked and there are no doors at all. A 12-year-old boy, a nine-year-old girl, and an eight-year-old girl. And [M. D.], who--I'm sorry. [S. D.], who is a pistol, saying, you know, it felt icky. Well, I have to tell you, listening to her testimony felt icky. You don't need to do that anymore, Dad. . . . Going to the bathroom when your daughters are in the bathroom and using the facilities in there, obviously you're a man, having to show your penis. What could you have been thinking? How could that be appropriate? Being in bed together at all is inappropriate." The evidence credited by the court supports its conclusion that the girls were at substantial risk of sexual abuse, within the meaning of section 300, subdivision (d).

We reach a different conclusion as to count b-2, which alleged that the girls had suffered, or there is a substantial risk that they would suffer, serious physical harm as a result of father's failure to supervise or protect them adequately. A child may be adjudged a dependent under section 300, subdivision (b) if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment" There are three elements for a finding under this provision: "1) neglectful conduct by the parent in one of the specified forms; 2) causation; and 3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) "Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence

indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” (*Id.* at p. 823.)

The sustained factual allegation on count b-2 was that on numerous prior occasions, father demonstrated inappropriate boundaries by inappropriately continuing to dry the girls after a shower, being in bed together, having no doors on the bedrooms, and using the bathroom in the girls’ presence. While there is evidence supporting the conduct alleged, that conduct does not demonstrate that the girls were exposed to substantial risk of serious physical harm. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399 [jurisdictional finding under subdivision (b) was error absent allegations as to severity of any physical harm from alleged touchings].)

In addition, jurisdiction under section 300, subdivision (b) is expressly limited to continuing risk: “The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” There are no allegations and no evidence indicating the acts may continue in the future. The evidence does not establish that the girls are currently at risk of serious physical harm, as required for jurisdiction under subdivision (b). (See *In re Alysha S.*, *supra*, 51 Cal.App.4th at pp. 398-399.) The court erred in asserting jurisdiction under section 300, subdivision (b).

Our conclusion does not require reversal. Where, as here, there is a valid ground for dependency jurisdiction, we do not reverse the jurisdictional order because another ground is unsupported. (*In re Dirk S.* (1993) 14 Cal.App.4th 1037, 1045; *In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876-877.) There is sufficient evidence to support the court’s adjudication of dependency based on section 300, subdivision (d), and we affirm the jurisdictional order on that basis. Because we affirm the jurisdictional order, we reject father’s claim that the dispositional order is moot.

DISPOSITION

The jurisdictional order declaring the children dependents under section 300, subdivision (b) is reversed; in all other respects, the jurisdictional and dispositional orders are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.